Supreme Court, U.S.
FILED
FEB 2 8 2000
CLERK

(2)

No. 99-1250

IN THE
SUPREME COURT OF THE UNITED STATES

FREDERICK D. HARRIS, et al.
Petitioners,

v.

ELAINE LISTON, et al.
[JACKSON ROAD COMPANY]
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

FORREST A. NORMAN, III *
WESTON HURD FALLON
PAISLEY & HOWLEY LLP
2500 TERMINAL TOWER
50 PUBLIC SQUARE
CLEVELAND, OH 44113-2241
(216) 241-6602

Counsel for Respondent

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

1 OPP

CORPORATE DISCLOSURE STATEMENT OF JACKSON ROAD COMPANY

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Jackson Road Company, by and through its attorney, respectfully submits this Corporate Disclosure Statement.

Jackson Road Company was an Ohio general partnership formed on May 20, 1983. It had two equal general partners: E&H Development Corp., and Sunrise Development Co. Sunrise is an Ohio corporation which was incorporated on May 19, 1966. Sunrise is a wholly-owned subsidiary of Forest City Enterprises, Inc.

Jackson Road Company is now defunct, and has disposed of all of its assets.

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED

1. Whether denying Petitioners the right to bring suit against a developer, based upon the statute of limitations, where the cause of action accrued and expired for a prior owner, constitutes a deprivation of property without due process of law.

2. Whether the Ohio Supreme Court's interpretation and application of an Ohio statute of limitations constitutes a deprivation of property without due process of law.

3. Whether the transfer of title to land revives an otherwise expired cause of action against a developer for defects on that property.

4. Whether there is any public policy basis for the creation of a federal rule relating to the duty of care owed by real estate developers to subsequent purchasers arising from the development of land.

5. Whether a state has the right to interpret a state statute of limitations barring suit against a developer without it being an unconstitutional deprivation of property without due process of law.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE i

RESPONDENT'S STATEMENT OF QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSION 5

TABLE OF AUTHORITIES

Page

Cases

Bendix Autolite Corporation v. Midwesco Enterprises, Inc.
486 U.S. 888, 108 S. Ct. 2218,
100 L.Ed. 2d 896 (1988) 3

Chase Secur. Corp. v. Donaldson
325 U.S. 304, 65 S.Ct. 1137,
89 L.Ed. 1628 (1945) 4

Hawkins v. Brown
5 Pet. 457, 466-467, 8 L.Ed. 190,
193-184 (1831) 3

Hiatt v. Brown
15 Wall 177, 184, 21 L.Ed. 128, 130 (1873) . . . 3

McMillan v. Brune-Harpenau-Torbeck Builders, Inc.
8 Ohio St.3d 3 (1983) 4

Metcalf v. Watertown
153 U.S. 671, 14 S. Ct. 947, 38 L.Ed. 861 (1894) 3

Wheeler v. Jackson
137 U.S. 245, 121 S. Ct. 76, 34 L.Ed. 659 (1890) 4

Statutes:

O.R.C. 22305.09(D) 2

JURISDICTION

Rule 10 of the Rules of the Supreme Court of the United States provides that this court may grant a petition for certiorari only for compelling reasons. The character of the issues presented for review by Petitioners does not fit with the examples set forth in Rule 10. There is no federal question involved, and no conflict between state courts of last resort relating to a federal question.

Petitioners have not set forth a justifiable basis for invoking this court's jurisdiction. The statute of limitations issue which Petitioners present as a due process claim is clearly a matter of state law, and does not amount to a federal question. The "public policy interests" to which Petitioners allude are already recognized in Ohio. Petitioners would not obtain the relief sought even if this court were to create a new federal rule "clarifying the duty owed by developers to subsequent purchasers." Therefore there is no justiciable controversy. Moreover, there is no compelling reason given which would merit *the creation* of a federal rule relating to a developer's duty of care.

For these reasons, and those explained below, there were no errors in the lower court, and there is no basis for extending jurisdiction.

STATEMENT OF THE CASE

Petitioners' Statement of the Case contains several significant errors by omission. First, Petitioners omit the fact that they brought suit against thirteen defendants, including Respondent, settling with many, and proceeding to trial against the prior owners of the property. A jury awarded Petitioners $319,000 against the prior owners for the condition of the property. Therefore, the suggestion that Petitioners had been denied the right to seek redress is simply wrong.

Second, Petitioners did not relate the fact that the allegedly defective condition complained of had existed for more than 7 years prior to suit, and that the prior owners were well aware of the conditions for their entire 6 year tenure as owners of the property. Petitioners do not mention that the cause of action was time barred for the prior owners by the 4 year statute of limitations set forth under O.R.C. §2305.09(D).

Finally, Petitioners omit the fact that the purchase agreement between Respondent and a prior owner (two owners before Petitioners) required the buyer to install drainage in the area which is now the subject of Petitioner's complaints.

ARGUMENT

Statues of limitation have long been recognized to be both constitutional and within the right of the sovereign state to enact. *Hawkins v. Barney,* 5 Pet. 457, 466-467, 8 L.Ed. 190, 193-194 (1831); *Metcalf v. Watertown*, 153 U.S. 671, 14 S.Ct. 947, 38 L.Ed. 861 (1894). Such limitations are based on the theory that during the prescribed period the courts of the locality *are* open to the claimant, *Hiatt v. Brown*, 15 Wall 177, 184, 21 L.Ed. 128, 130 (1873), and are an integral part of our legal system. *Bendix Autolite Corporation v. Midwesco Enterprises, Inc.,* 486 U.S. 888, 108 S. Ct. 2218, 100 L.Ed. 2d 896, (1988). This Court has recognized the right of each state to organize its judicial tribunals, including access thereto, according to its own notion of policy, and each state may prescribe the time within which suits shall be litigated in its courts. *Metcalf, supra*, 153 U.S. at 674. The general rule is that this Court will follow the decision of the highest court of a state in the construction of that state's statutes. *Id.* at 153 U.S. 678-679.

Here, Petitioners request review of the Ohio Supreme Court's application of the statute of limitations under the theory that the statute of limitations in question deprived Petitioners of property without due process of law. Petitioners are not, however, alleging that the statute itself is unconstitutional, or conflicts with the rights afforded citizens under the United States Constitution. Petitioners are simply disgruntled with the fact they purchased property (and its attendant rights) for which the right to bring a cause of action against the developer had already expired.

The question of whether a statute of limitations deprives a person of property without due process of law has long sense been settled. Statutes of limitations do not deprive

one of property without due process of law unless it unreasonably limits the opportunity to enforce the right by suit. *Chase Secur. Corp. v. Donaldson*, 325 U.S. 304, 65 S. Ct. 1137, 89 L.Ed. 1628 (1945); *Wheeler v. Jackson*, 137 U.S. 245, 121 S. Ct. 76, 34 L.Ed. 659 (1890). Here, the cause of action accrued and expired for the prior land owner. By the time the Petitioners bought the land the right to bring suit had expired. Sellers no longer possessed the right, and therefore could not convey the right to Petitioners. There is nothing inherently unreasonable alleged by Petitioners with respect to the statute of limitations itself.

There is no question that the courthouse doors were open for the prior owners of the land. The real question is thus whether the transfer of land somehow revives an expired cause of action. There is no legal precedence for this position at any state or federal court level. No arguments of policy have been offered on this point. There is no logical reason to create a federal rule permitting an expired cause of action to revive merely because of the transfer of title to land.

Petitioner's second basis for the issuance of the writ is moot. Ohio already recognizes the right of a subsequent purchaser to sue the developer for defects. *McMillan v. Brune- Harpenau-Torbeck Builders, Inc.*, 8 Ohio St.3d 3 (1983). The "clarification" which Petitioners seek already exists in Ohio. Therefore, "clarification" would not provide Petitioners the relief sought. Consequently, there is no justiciable controversy.

Finally, the fact that there may be different laws among the 50 states regarding rights of subsequent purchasers against the developers of land is perfectly acceptable. There is no compelling constitutional basis or policy interests justifying the creation of a federal rule on this issue.

CONCLUSION

There are no constitutional and/or public policy interests at issue which merit review by this Court. Therefore, Respondent's respectfully request that this Court deny this petition for review.

Respectfully submitted,

/s/_____
FORREST A. NORMAN, III. (0059389)
WESTON HURD FALLON PAISLEY
& HOWLEY, L.L.P.
2500 Terminal Tower
50 Public Square
Cleveland, Ohio 44113-2241
(216) 241-6602

Attorney for Respondent